(1) Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

PAUL MOSLEY,

Petitioner,

-versus-

HALTER MARINE GROUP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

M. H. GERTLER
Counsel of Record
LOUIS L. GERTLER
GERTLER, GERTLER, VINCENT
& PLOTKIN, L.L.P.
127-129 Carondelet Street
New Orleans, LA 70130
(504) 581-6411

Curry & Taylor Appellate Service (202) 393-4141/ussupremecourt@hotmail.com

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QUESTION PRESENTED FOR REVIEW

Can a statutory employer, who has contractually relieved itself of all the traditional worker's compensation obligations of an employer, still retain the protection of tort immunity under Section 905(a)?

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33 U.S.C. 905(a) ..... *passim*

Opinions Below

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1a. The judgment of the United States District Court for the Eastern District of Louisiana dated September 23, 1998 is set forth in the Appendix, p. 4. Both decisions are unreported.

Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its Decision in this case on July 19, 1999. This Petition was filed within 90 days of the issuance of this Decision, and is thus timely.

Constitutional, Statutory And Ordinance Provisions Involved In This Case

The Longshoremen and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. Section 901 *et. seq.*

Section 905(a) provides:

Employer liability; failure of employer to secure payment of compensation.

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability

of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 904 of this title . . .

STATEMENT OF THE CASE

Paul Mosley (hereinafter referred to as "Petitioner") was hired by Technical Employment Services, Inc. (hereinafter referred to as "TechServ") in April 1997 as a "fitter." TechServ and Halter Marine Group, Inc. (hereinafter referred to as "Halter") entered into a Contract Labor Agreement on April 16, 1997 whereby TechServ furnished employees for a fee.

In accordance with this contractual relationship TechServ assigned Petitioner to work at one of Halter's shipyards. Although Petitioner was assigned to work at Halter, he was at all times employed by TechServ. TechServ paid his wages, had the exclusive right to discipline or

discharge him, and assumed sole responsibility for his compliance with Halter's policies, procedures, and safety rules. Most importantly, Tech Serv obligated itself to obtain worker's compensation insurance and agreed if it failed to secure the coverage or if the coverage lapsed, TechServ, and only TechServ, would be responsible for worker's compensation liability.

On July 30, 1997, propane leaking from a defective torch provided to Petitioner by Halter caused an explosion in the hold of the ship where Petitioner was working. Petitioner was seriously burned and left permanently disabled.

Petitioner has been unable to work since the explosion and now has difficulty completing even minor physical tasks. Until this explosion, Petitioner was gainfully employed as a skilled worker and helped to support a family of nine children. TechServ initiated the payment of worker's compensation benefits to Petitioner shortly after the accident.

Petitioner filed a complaint in the United States District Court, Eastern District of Louisiana, alleging a third-party tort claim against Halter for its negligence in providing the dangerous torch.

Halter filed a Motion for Summary Judgment claiming that Halter was a borrowing employer under the borrowed servant doctrine[1] and, therefore, was automatically immune in tort. Summary Judgment was granted by the District Court on September 24, 1998. The Fifth Circuit affirmed the District Court on July 19, 1999.

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[1] *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220, 29 S. Ct. 252, 253 53 L. Ed. 480 (1909).

ARGUMENT

The operative part of 33 U.S.C. § 905(a) states:

> except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee may elect. . . to maintain an action at law or in admiralty for damages on account of such injury or death.

Halter is in the business of building and repairing various types of vessels. TechServ is solely in the business of an employment agency providing employees for a fee. On summary judgment there was no dispute that TechServ and Halter entered into a contract covering Petitioner's services at Halter. It was also undisputed that TechServ, not Halter, was responsible for and did secure the payment of worker's compensation benefits, wages, payroll taxes and unemployment compensation. Furthermore, a valid and enforceable indemnification agreement protected Halter from the payment of any claims arising out of work related injuries. Halter desired to be considered an independent contractor for purposes of avoiding any employee benefits while, at the same time, be considered a borrowing employer under the borrowed servant doctrine for purposes of tort immunity.

The Fifth Circuit in *West v. Kerr-McGee Corporation, et al 765 F.2d 526 (5th Cir. 1985)* decided that the 1984 amendment to Section 905(a) did not overrule the borrowed servant doctrine. Accordingly, independent contractors, such as Halter, can now cloak itself with immunity if a court concludes that it is a statutory employer. However, the Fifth Circuit was not presented, until now, with a statutory

employer (Halter) who contractually obligated a hiring service (TechServ) to secure the payment of compensation.

The Supreme Court has held that the LHWCA was enacted with the welfare of longshoremen and harbor workers in mind. *Pillsbury v. United Eng'g Co., 342 U.S. 197 (1952).* Therefore, Section 905(a) must be interpreted with the welfare of these workers in mind, including the incentive for employers to fulfill their duty to provide a safe workplace. *Manister v. Tenneco Oil Co., 867 F. 2d 892, 897 (5th Cir. 1989), on remand, mandate recalled and modified on other grounds 934 F. 2d 67.* In this case, Halter has maneuvered itself into the best of all worlds. On the one hand, it claims immunity from tort under the borrowed servant doctrine while, on the other hand, it has contractually shifted the burden to TechServ to secure and make the payment of worker's compensation. The practical result is that Halter has no accountability and is left with no incentive to provide a safe place to work and insure the welfare of its workers. There is no exception in 905(a) allowing employers to enjoy this tort immunity while creatively shifting the actual responsibility to secure and pay worker's compensation benefits to a nominal or lending employer. The Court in *Pillsbury*, in determining the applicable statute of limitations to apply under the Act, specifically held that courts were not in a position to alter the construction of the statute because only Congress is empowered to do so. *Id.* Federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own concept of prudent public policy; only when literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design with exception to statutory language be judicially imposed. *United States v. Rutherford, 442 U.S. 544, 551 (1979).*

Petitioner argues that it was not the intent of Congress in Section 905(a) to allow a statutory employer to creatively escape from any liability in tort and worker's compensation.

Judge Tate states in his concurrence in *West* that "It makes no functional sense to hold a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded . . . solely against the subcontractor." *West, 765 F.2d at 533.* Likewise, it makes no functional sense for borrowing employers, such as Halter, who have avoided securing and paying worker's compensation to be able to claim the exclusivity of 905(a).

Conclusion

The Court should grant certiorari to review this important matter. This is a profound issue because the Halter contract presents an ominous trend whereby statutory employers are enjoying tort immunity under the borrowed servant doctrine and designing contracts that have the practical effect of exculpating them from worker's compensation. This also is in direct conflict with the clear language of 905(a) which requires the employer to secure the payment of compensation in order to enjoy immunity in tort. This is a choice within the control of the employer.

Respectfully submitted,

GERTLER, GERTLER, VINCENT
& PLOTKIN, L.L.P.
M. H. GERTLER #6036
LOUIS L. GERTLER #23091
127-129 Carondelet Street
New Orleans, LA 70130
(504) 581-6411
ATTORNEYS FOR PLAINTIFF

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Paul Mosley

v.

Halter Marine Group

98-31158

FILED 7/18/99

Before HIGGINBOTHAM, JONES, and BARKSDALE, Circuit Judges. PER CURIAM .

Appellant, Paul Mosley, sued Halter Marine Group, Inc. (Halter) and Technical Employment Services, Inc. (TechServ), for personal injuries incurred while he was working as a ship fitter at a Halter yard. The district court granted Halter' s motion for summary judgment on the basis that Mosley was Halter's borrowed employee and, therefore, was limited to benefits under the Long shore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 et seq. It is from that judgment that Mosley appeals.

This court reviews a decision to grant a motion for summary judgment de novo, applying the same standards as the district court. See Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). The nine factors which inform our determination of borrowed employee status are set forth in Gaudet v. Exxon Corp., 552 F.2d 351, 355 (5th Cir. 1977), and although we address each in turn, we do not list them separately:

Mosley worked at the direction and under the control of Halter leadermen, who told Mosley "what work to do, and when and where to do it" on a daily basis; Mosley put forward no evidence to the contrary. See Melancon v. Amoco Prod. Co:, 834 F.2d 1238, 1245 (5th Cir. 1993). The ship fitting work was clearly Halter's work, and not that of TechServ, whose business "existed solely to furnish employees to other companies so that the employee could perform the work of the borrowing employer." See Caps v. NIL. Baroid-NL Indus., Inc., 784 F.2d 615, 617 (5th Cir. 1986).

Although Mosley provided some of his own personal equipment, Halter provided him with a cutting torch and made available other welding equipment, and Mosley performed his work exclusively at Halter facilities. See Melancon, 834 F.2d at 1245. Halter was obligated to pay Mosley as it provided funds to TechServ for Mosley's wages, and Mosley was paid based on the number of hours he worked at Halter. See id. Mosley acquiesced in the new employment as he knew TechServ would send him out to work for other employers, and TechServ terminated, at least temporarily, its relationship with Mosley during his employment at Halter. See Caps, 784 F.2d at 617. These factors all point to borrowed employee status.

Mosley's length of employment at Halter was not significant and is, therefore, neutral. See id. As for whether any agreement existed between Halter and TechServ regarding Mosley's status, Mosley points to a provision in the Halter/TechServ Contract Labor Agreement which purports to deem all TechServ employees as independent contractors. Mosley contends that this provision creates an issue of fact as to the parties' intent. However, parties may not contractually

defeat borrowed servant status when, as here, the reality is otherwise. See Melancon, 824 F.2d at 1245.

The only issue of fact is whether Halter had the right to terminate Mosley; the affidavit of TechServ's general manager directly contradicts express language in the contract. However, that alone is insufficient to preclude summary judgment in light of the other factors which demonstrate that Mosley was Halter's borrowed servant, See Gaudet, 562 F.2d at 358.

Mosley's contention that Halter is not liable for LHWCA benefits and is, therefore, not entitled to immunity, is without merit in light of our holding in Total Marine Services v Director. OWCP, 87 F.3d 774, 779 (5th Cir. 1996) . Further, the contract does not relieve Halter of the obligation to reimburse TechServ for benefits, but places on TechServ the obligation of obtaining insurance in the first instance.

For the foregoing reasons, the district court's judgment is

AFFIRMED.

JUDGMENT

The Court having previously granted the motions of both defendants for summary judgment, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED DECREED that there be a judgment in favor of defendants, Halter Marine Group, Inc., and Technical Employment Services, Inc., and against plaintiff, Paul Mosley, dismissing said plaintiff's complaint plaint with prejudice.

Each party is to bear its own Costs.

New Orleans, Louisiana, this 23 day of September, 1998

DISTRICT COURT JUDGE

CONTRACT LABOR AGREEMENT
TEMPORARY AGENCIES

This Agreement (the "Agreement") is made and entered into this 16th day of April 16th 1997, by and between TechServ* (Contractor), a Louisiana corporation with a principal place of business in Harvey, Louisiana and HALTER MARINE INC, a Delaware corporation with a principal place of business in Gulfport, Mississippi ("Purchaser"). *Technical Employment Services, Inc. (d/b/a Tech-Serv).

IN CONSIDERATION of the mutual promises, Covenants and Conditions hereinafter set forth, Contractor and Purchaser agree as follows:

I. Contractor will perform and furnish, in a timely, effective and efficient manner all the services described in this Agreement and specifically furnish qualified employees to work on the general project(s) which may be hereinafter assigned to Contractor by Purchaser. Contractor's performance shall begin upon notification by Purchaser to Contractor of the need for temporary services. All services provided by Contractor shall be diligently prosecuted and completed in a timely manner throughout the term of this Agreement.

2. Purchaser shall provide to Contractor the general specifications of the project and the qualifications of Contractor's employees needed to accomplish the work of Purchaser Contractor agrees to furnish said qualified employees as per Purchaser's specifications. It is agreed that all training necessary to qualify Contractor's employees shall

be provided by and undertaken at the direction of Contractor. Contractor (and Contractor's employees) shall at all times be deemed an independent contractor and the relationship of these parties to Purchaser shall not at any time constitute any relationship other than that of an independent contractor, except as otherwise expressly provided herein.

3. Contractor represents and warrants to Purchaser that during the term of this Agreement, Contractor shall:

(a) Assume responsibility for the payment of wages to each of the employees furnished to Purchaser hereunder without regard to whether any payments have been made by Purchaser to Contractor hereunder or otherwise;

(b) Assume responsibility for the payment of payroll taxes and the collection of taxes from payroll for each employee furnished to Purchaser:

(c) Retain the right of direction and control over the management of Workers' Compensation claims, claim filing and related procedures and statutory compliance with respect to employees furnished to hereunder;

(d) Implement and comply with all appropriate state and federal laws relating to reporting, sponsoring, filing and maintaining benefit and welfare plans and be solely responsible for providing benefit and welfare plans for employees provided to Purchaser hereunder; and

(e) Upon the execution of this Agreement by both parties give written notice to Contractor's worker's compensation insurer, and all employees :: employees of Contractor furnished to Purchaser (prior to the time they arc so furnished), of the existence and terms of this Agreement

and that a contract for hire exists between Purchaser and each such employee of Contractor.

(f) Provide preemployment drug testing for all employee candidates and evidence of results prior to placing each employee.

(g) Assume responsibility for employees' compliance with Contractor's policies, procedures and safety rules.

4. As compensation for the services and work to be furnished and performed by the Contractor. Contractor shall invoice Purchaser, and Purchaser shall pay Contractor a sum which shall be Computed by multiplying the hourly rates by job classification. as set forth on Exhibit A attached hereto and made a part hereof, by the actual hours worked by Contractor's employees on Purchaser's projects. Contractor shall submit a weekly invoice which shall be accompanied by materials substantiating the calculation of the invoice amount in such reasonable detail as Purchaser may request. In the event that Contractor's employees are deemed to be not qualified in accordance with Purchaser's specifications within 3 (three) days of first being provided to Purchaser, then and in that event, Purchaser shall not pay any compensation, reporting fees, etc. in connection with work performed by such unqualified personnel. In the event these services are rendered by salaried employees, Exhibit A will reflect a monthly rate, and Contractor shall submit invoices semi-monthly for time accrued. In the event the time accrued Is less, the full period invoices shall reflect charges pro-rata for the period.

5. . Purchaser understands and agrees with Contractor that all individuals assigned to work on Purchaser's projects by Contractor are the employees of Contractor and not employees of Purchaser and further that Contractor and Contractor's employees offer services to the general public and that Contractor's employees may work for other entities as well as Purchaser; provided, however, that Purchaser shall, during the term of this Agreement, have the right of Control over the manner and details of work to be performed by employees provided to Purchaser by Contractor hereunder. Additionally, Contractor and Purchaser hereby acknowledge and agree that (i) Purchaser shall be a "special employer" or "co-employer" of each employee of Contractor furnished to Purchaser under this Agreement and each such employee shall be a "loaned servant" solely and exclusively for purposes of applicable law relating to Worker's Compensation, and (ii) the work to be performed by employees of Contractor furnished to Purchaser hereunder is exclusively the work of Purchaser. 6.

6. Purchaser understands that all tights of termination of services of Contractor's employees are expressly reserved to Contractor. However. Contractor and its employees expressly agree that if a cessation of work occurs as a result of the direction of Contractor. Contractor shall continue to be obligated to perform services hereunder and be responsible for any damage to Purchaser accruing as a result of such cessation of work

7. In performing its obligations hereunder. Contractor shall comply with all applicable laws and with all applicable orders, rules and regulations of constituted authority. Contractor warrants that the prices charged under this Agreement for services are not in violation of any law or governmental regulation

8. Contractor shall continuously protect Purchaser's property and the property of others from injury or loss Contractor represents that it has examined and is familiar with the sites of the work and all conditions and circumstances surrounding such work.

9 Purchaser may, upon written notification and mutual agreement of both parties, withhold such amounts as may be necessary to protect Purchaser from loss on account of defective work, liens or probable liens, damage or loss to Purchaser for which Contractor is/or may be liable and probable claims by Purchaser for indemnity from the Contractor under this Agreement.

10. Contractor agrees to indemnify, save, defend and hold harmless Purchaser from and against payment of any and all contributions withholding deductions Or taxes measured by the Wages, salaries or other compensation paid to persons employed by the Contractor and performing work for Purchaser. Contractor further agrees to assume, protect, save, defend, indemnify and hold harmless Purchaser from and against any and all loss. cost, damage or expense including attorney's fees and court costs, which Purchaser may suffer or sustain or be liable for, and against any and all claims, demands or suits arising out of injury Or death of persons and/or loss of damage to property (whether of the parties hereto, or of others), including loss of use thercof, Occurring in arising out of or in connection with the services and work covered by this Agreement, or the unseaworthiness of Purchasers vessels or craft or the vessels or craft of others, whether or not in the care, custody and/or control of Purchaser, to the extent caused by the negligent acts of the Contractor or Purchaser or their respective employees Purchaser and Contractor agree that should Purchaser, in its

sale and absolute discretion deem it necessary to receive assurances of Contractor's capability to indemnify Purchaser, Purchaser may upon reasonable notice request Contractor to furnish a surety bond in favor of Purchaser in such amounts and sums as Purchaser shall deem necessary to provide assurance of indemnification in accordance with this Section. Contractor also agrees to insure this assumption of liability in accordance with the minimum requirements set out in clause 13 of this Agreement

11. Contractor shall have, on file, a valid 1-9 Employment Eligibility Verification form and supporting documentation stating that all of Contractor's employee(s) is/are authorized to work in the United States.

12. Purchaser's right to require strict performance of Contractor's obligations shall not be affected in any way by any previous waiver. forbearance, or course of dealing,

13. Contractor agrees to maintain, pay for and keep in force and effect for the term of this Agreement the following insurance, with reliable insurance companies satisfactory to Purchaser, and to cause certificates evidencing such insurance to be furnished to Purchaser in the following minimum ... amounts: (i) Workers compensation insurance which shall fully comply with the requirements of state laws, as well as federal laws, if applicable, and covering all employees of Contractor furnished to Purchaser in connection with the performance of Contractor's obligations and duties under this Agreement. Such insurance shall include a Marine Employer's Liability endorsement and shall name Purchaser as an additional assured contain a co-employer endorsement, and contain a waiver of subrogation in favor of Purchaser; (ii) Comprehensive General Liability naming Purchaser as an additional insured (including Contractor's Protective liability

when Sub-Contractors are used) covering bodily injury liability of $1,000,000 for each person and $3,000.000 in the aggregate, property damage liability of $1,000,000, and Contractor's indemnity obligations as set forth herein; and (ill) Commercial Automobile Liability in the amount of $1,000,000, naming Purchaser as an additional insured, and containing a waiver of subrogation. It is expressly agreed and acknowledged by the parties hereto that the costs of required Worker's Compensation insurance premiums and coverage for employees furnished to Purchaser hereunder and Contractor's overhead expenses in connection with furnishing its employees hereunder, including without limitation the salaries of such employees are included in the fee payable by Purchaser to Contractor pursuant to Section 4 hereof. Contractor further acknowledges and understands that any failure to procure or lapses in insurance coverage shall not relieve Contractor of any responsibility whatsoever hereunder, and that Contractor's insured limits do not limit Contractor's liability.

14. This Agreement constitutes the entire agreement between Purchaser and Contractor and there are no agreements, understandings, conditions, or representations, express or implied, with reference to the subject matter hereof that are not merged within or superseded hereby.

15. It is expressly agreed that this Agreement and all terms and conditions hereof, whether express or implied, shall be governed by and construed in accordance with the laws of the State of Louisiana Purchaser and Contractor further agree that should any dispute over the interpretation. application, or enforcement of this Agreement not he amicably resolved, and/or if in the event any employee of Contractor should undertake any judicial action against Purchaser to enforce any rights under this Agreement whether

express or implied implied or any rights allegedly vested in such employee by applicable state or federal law. then in either or both of those events, such dispute shall be resolved in the appropriate State or Federal court located in the Parish of Orleans. State of Louisiana. and the parties hereto expressly waive any rights they-now or hereafter may have to complain complain of such designation of venue. Any notice required or permitted to be given hereunder shall be by U.S. certified mail, return receipt requested,to the addresses of the parties set forth on the signature page hereof,or at such other addresses as the parties may provide to one another by written notice as provided herein.

16. Contractor warrants and represents to Purchaser that Contractor is in compliance with all applicable local, state and federal employment, employee leasing and related laws and further agrees to abide by all fair employment regulations contained therein and to indemnify, save, defend and hold harmless the Purchaser from and against any losses of any kind arising out of Contractor's failure to comply with any of the same.

17. This Agreement shall continue in full force and effect until terminated by either Purchaser or Contractor upon thirty (30) days' prior written notification to the other party.